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What the Erie Surrogate Triplets can Teach State Legislatures about the need to Enact Article 8 of the Uniform Parentage Act (2000)

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WHAT THE ERIE “SURROGATE TRIPLETS” CAN TEACH STATE LEGISLATURES ABOUT THE NEED TO ENACT ARTICLE 8 OF THE UNIFORM PARENTAGE ACT (2000)

ROBERT E. RAINS*

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[L]aw, like nature itself, makes no provision for dual fatherhood.¹

The atmosphere surrounding today's decision is one of make-believe. . . .
When and if the Court awakes to reality, it will find a world very different from the
one it expects.²

I. INTRODUCTION

Two decades ago, the nation was riveted by the saga of Mary Beth Whitehead, who entered into a surrogacy contract with William Stern under which she was to be impregnated with his sperm, carry and deliver the resulting child, and then turn the child over to Mr. and Mrs. Stern to be theirs and be paid \$10,000.³ Whitehead got pregnant, delivered a healthy girl on March 27, 1986, initially turned over the child to the Sterns, then asked for the child back for a week and absconded with the child across state lines.⁴ The Sterns and Whitehead could not even agree on the child's name: to the Sterns she was Melissa, to Whitehead she was Sara.⁵ After Whitehead was apprehended in Florida and the child was returned to New Jersey, a New Jersey court held a thirty-two day trial, upheld the surrogacy contract, terminated Whitehead's parental rights and allowed Mrs. Stern to adopt.⁶ In a much cited opinion, the New Jersey Supreme Court reversed.⁷ The Court found that the surrogacy contract violated public policy and several aspects of New Jersey's adoption act.⁸ It found that Whitehead was the child's mother and that there was no basis to terminate her rights.⁹ The New Jersey Supreme Court noted the lack of statutory law on surrogacy and concluded with these words:

If the Legislature decides to address surrogacy, consideration of this case will highlight many of its potential harms. We do not underestimate the difficulties of legislating on this subject. In addition to the inevitable confrontation with the ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest. Legislative consideration of surrogacy may also provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology—*in vitro* fertilization, preservation

¹ Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (plurality opinion)(Scalia, J.).

² *Id.* at 156 (Brennan, J., dissenting).

³ See PHYLLIS CHESLER, SACRED BOND: THE LEGACY OF BABY M. (1988); MARY BETH WHITEHEAD WITH LORETTA SCHWARTZ-NOBEL, A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M. CASE (1989).

⁴ *In re Baby M.*, 537 A.2d 1227, 1236-37 (N.J. 1988).

⁵ Robert Hanley, *Baby M. Will Become Angry Over Legal Fight, Mother Says*, N.Y. TIMES, April 8, 1987, at B1.

⁶ *Baby M.*, 537 A.2d at 1237-38.

⁷ *Id.* at 1234-35.

⁸ *Id.* at 1240-50.

⁹ *Id.* at 1251-53.

of sperm and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of the technology—especially for infertile couples—while minimizing the risk of abuse. The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area.¹⁰

Two decades later, despite the repeated efforts of the National Conference of Commissioners on Uniform State Laws (NCCUSL), many state legislatures have failed to address the difficult issues presented by surrogacy, and those that have done so have failed to legislate in a consistent, much less uniform, manner from one state to another.¹¹

One scholar has categorized four different judicial or legislative approaches to resolving questions of “legal maternity”: (1) intent-based theory; (2) genetic contribution theory; (3) gestational mother preference theory; and (4) the “best interest of the child” theory.¹² And, in many states, there is simply a legal void.¹³

The inevitable results of legislative inaction and legislative and judicial inconsistency are well illustrated by the contemporary, and on-going, saga of the Erie “surrogate triplets.”

On November 19, 2003, Danielle Bimber gave birth at the Hamot Medical Center in Erie, Pennsylvania, to triplet boys¹⁴ whom she named Matthew, Mark, and Micah Bimber.¹⁵ But the triplets’ father, an Ohio mathematics professor named James Flynn, and his paramour/fiancée, Eileen Donich, insisted that the triplets were, in fact, Easton, Lance, and Shane Flynn.¹⁶ Filling out the roster of actual and potential parents were the egg donor, Jennifer Rice, a young woman in Texas, and Douglas Bimber, husband of Danielle.¹⁷ And, in addition to Pennsylvania, Ohio, and Texas, there was yet another state with a connection to the matter, Indiana, the home base of Surrogate Mothers Inc. (“SMI”), which was responsible for bringing together, to a greater or lesser extent, the five adults who were ultimately to battle, directly or indirectly, over parenthood and custody (or parenting) of the children¹⁸ who were to

¹⁰*Id.* at 1264.

¹¹UNIF. PARENTAGE ACT Prefatory Note (amended 2002), available at <http://www.law.upenn.edu/blj/archives/ulc/upa/final2002.htm>. See also *J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 12-22 (C.P. Erie 2004).

¹²Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 *DRAKE L. REV.* 605, 622 (2003).

¹³*J.F.*, 66 Pa. D. & C.4th at 13, 16.

¹⁴*Id.* at 6.

¹⁵*Flynn v. Bimber*, 70 Pa. D. & C.4th 261, 273 (C.P. Erie 2005), *vacated sub nom.*, *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006).

¹⁶*Id.* at 264-66, 273.

¹⁷*Id.* at 264. See also Barbara White Stack, *Multiple Moms, Dueling Dads in Case of Triplets Born in Erie Last Year*, *PITTSBURGH POST-GAZETTE*, Nov. 10, 2004, at B1. Although in some of the reported decisions involving the triplets the courts have used initials rather than names, I have opted to use the various players’ names in this article for the ease of the reader. These names all appear in published court decisions, as well as media reports.

¹⁸*J.F.*, 66 Pa. D. & C.4th at 4.

become known in the media, rather inartfully, as the “surrogate triplets.”¹⁹ But, obviously, whatever their names, they were and are very real children.

The legal battles over the triplets controversy have taken place, and continue, in the state courts of three states: Pennsylvania, Ohio, and Indiana. The litigation has even spilled over, quite improbably, into the federal bankruptcy court for the Western District of Pennsylvania. As of this writing,²⁰ various legal issues remain unresolved. This Article will explain the protracted legal battles over the “surrogate triplets” and explore potential legislation designed to avoid such battles in the future.

Many of the facts surrounding the triplets’ births and early lives were hotly disputed; and, as will be seen, different courts have adopted different versions of those elusive facts. However, as to some basics, there is no real disagreement. Danielle Bimber is a married woman residing in Pennsylvania with her husband, Douglas Bimber, and her three other children, Ryan, Brendan, and Julia.²¹ Danielle Bimber has held a few part-time, minimum wage jobs.²² Douglas Bimber is a self-employed home appliance repairman, making approximately \$9,600 per year.²³ Danielle had acquired much debt during her first marriage and, indeed, filed for bankruptcy while she was pregnant with the triplets.²⁴

In late 2001, the financially strapped Mrs. Bimber found SMI online and applied to be a surrogate mother.²⁵ SMI, in turn, matched her with James Flynn and Eileen Donich.²⁶ Flynn and Donich clearly occupy a different social and economic stratum than the Bimbers. As a mathematics professor and department chair, Flynn earns \$136,000 per year,²⁷ many times the Bimbers’ reported income. Dr. Donich, his paramour/fiancée, is a widowed dentist²⁸ who receives yearly death benefits based on

¹⁹See e.g. *Attorney: Egg Donor Wants Parental Rights Over Surrogate Triplets*, WKYC.COM, Dec. 8, 2004, http://www.wkyc.com/news/news_fullstory.asp?id=27377. See also Stack, *supra* note 17, at B1.

²⁰February 2008.

²¹*Flynn*, 70 Pa. D. & C.4th at 264, 266.

²²*Id.* at 266.

²³*Id.* at 264. According to one media account, Mrs. Bimber was earning \$11,000 per year when she worked. Barbara White Stack, *Custody Battle for Triplets Becomes Class Struggle*, PITTSBURGH POST-GAZETTE, July 10, 2004, at B1, available at <http://www.post-gazette.com/pg/04192/344408.stm>. If this is accurate and if Mr. Bimber was accurately reporting his income (something which does not always occur with the self-employed), then they were living below the poverty level. The United States Department of Health and Human Services (DHHS) set the 2003 federal poverty guidelines at \$21,540 for a family of five, and \$30,960 for a family of eight. Annual Update of the HHS Poverty Guidelines, 68 Fed. Reg. 6456, 6457 (Feb. 7, 2003).

²⁴*Flynn*, 70 Pa. D. & C.4th at 265.

²⁵*J.F.*, 66 Pa. D. & C.4th at 4.

²⁶*Id.*

²⁷*Flynn*, 70 Pa. D. & C.4th at 264.

²⁸*Surrogate Mom, Biological Dad Battle Over Triplets*, ST. PETERSBURG TIMES, May 1, 2005, available at http://www.sptimes.com/2005/05/01/Worldandnation/Surrogate_mom__bio_log.shtml.

the account of her long deceased husband.²⁹ Moreover, according to media reports, there is an enormous age difference between Mrs. Bimber, on the one hand, and Flynn and Donich, on the other. As of July 2004, Mrs. Bimber was reported as being 30 years old, while Flynn and Donich were 62 and 60 respectively.³⁰

In the summer of 2002, Flynn, Mr. and Mrs. Bimber, and Jennifer Rice, the egg donor, signed a surrogacy contract drawn up by Steven Litz, SMI's director and attorney.³¹ This surrogacy contract (also known as a "gestational agreement") contained a number of salient provisions, some of which certainly appear to be in tension with others.

The contract originally called for Flynn to pay Mrs. Bimber \$15,000 for her services for carrying his child to term.³² He was to make a payment upon delivery of the child.³³ Under handwritten additions to the agreement, Flynn was to pay Mrs. Bimber \$1,000 per month for three months and \$20,000 for a multiple birth.³⁴ In all, Flynn paid Mrs. Bimber \$24,000.³⁵

Section 3 of the contract provided that Mrs. Bimber was not consenting to termination of her parental rights or adoption, just indicating her intention to do so after the children were born.³⁶

Section 15 provided that if Mrs. Bimber were awarded custody of the children, she would have to reimburse Flynn any child support he might be ordered to pay as well as any moneys paid to her under the contract.³⁷

Section 20 provided that Flynn would be legally responsible for the children (unless a paternity test revealed that he was not the father).³⁸ Significantly, the contract did not purport to identify a legal mother for the children, unless Flynn became unable to act as their father. Section 21 provided that if something happened to Flynn, his paramour/fiancée, Donich, would be his successor.³⁹ Thus, under paragraph 20, the children would have a legal father but no mother; but if paragraph 21 became operational, they would have a mother but no father.

²⁹*Flynn*, 70 Pa. D. & C.4th at 266. Although in his testimony, Prof. Flynn described Dr. Donich as his fiancée, he also testified that no marriage date had been set and that they could not afford to give up the death benefits pension that Donich receives because "we really need the money." *Id.*

³⁰Stack, *supra* note 23.

³¹*J.F.*, 66 Pa. D. & C.4th at 4.

³²Contract Between Biological Father, Egg Donor, and Surrogate Mother, dated July 13, 2002, § 7A. [hereinafter Contract](This is the surrogacy contract or "gestational agreement" prepared by SMI which gave rise to the saga of the Erie "surrogate triplets.")

³³*Id.*

³⁴*Id.*

³⁵*In re Bimber*, 318 B.R. 297, 298 (Bankr. W.D. Pa. 2004).

³⁶Contract, *supra* note 32, at § 3.

³⁷*Id.*, at § 15.

³⁸*Id.* at § 20.

³⁹*Id.* at § 21.

The contract contained a provision that it “shall be governed by and enforced in accordance with the laws of the state of OH.”⁴⁰ Finally there was a Release and hold harmless clause stating, “Upon the birth of the child, Surrogate and/or E.D. (egg donor) will surrender any custody rights to the child to the biological father.”⁴¹

After signing the contract, the parties underwent extensive medical and psychological testing in late 2002 and early 2003.⁴² In April 2003, Mrs. Bimber was implanted with three embryos in Cleveland, Ohio.⁴³ The embryos were the product of Flynn’s sperm and Rice’s eggs.⁴⁴ Remarkably, the three embryos all took, and it soon became clear that Mrs. Bimber was carrying triplets.⁴⁵ In June 2003, on doctor’s orders, Mrs. Bimber quit her employment.⁴⁶ The doctor put Mrs. Bimber on bed rest from July 2003 until labor and delivery in November 2003.⁴⁷

The triplets were born by C-section at the Hamot Medical Center in Erie, Pennsylvania, on the morning of November 19, 2003.⁴⁸ They were somewhat premature at 35 weeks and were placed in the neonatal intensive care unit (“NICU”).⁴⁹ On November 22, Mrs. Bimber was discharged from the hospital.⁵⁰ And, on November 27, Hamot discharged the triplets to Mrs. Bimber.⁵¹ Litigation ensued.

II. WHOSE LAW? WHAT LAW?

The two most critical issues presented in the litigation were the parenthood and custody (parenting) of the triplets, although, as will be seen, there were and are other significant issues involved.

Four states have a relationship to the case: Indiana (home of Surrogate Mothers Inc., which brokered the agreement), Texas (home of the egg donor), Ohio (home of the biological father and his paramour and the state designated in the surrogacy contract as the source of law), and Pennsylvania (home of the surrogate mother and her husband, and birthplace of the triplets). A review of the pertinent statutory provisions of these four jurisdictions demonstrates just how contradictory and inadequate is the current state of American law on surrogacy.

Indiana’s statute provides:

⁴⁰*Id. at*, § 31.

⁴¹*Id. at* 9.

⁴²*J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 4 (C.P. Erie 2004).

⁴³*Id. at* 5.

⁴⁴*Flynn*, 66 Pa. D. & C.4th at 264.

⁴⁵*J.F.*, 66 Pa. D. & C.4th at 5.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id. at* 6.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id. at* 8.

Legislative declarations.—The general assembly declares that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following:

....

(6) Waive parental rights or duties to a child.

(7) Terminate care, custody, or control of a child.⁵²

The next section declares:

Surrogate agreements void.—A surrogate agreement described in section 1 [IC 31-20-1-1] of this chapter that is formed after March 14, 1988, is void.⁵³

Thus it is reasonably clear that under Indiana law, the surrogacy agreement at issue here would be void. But that does not answer who would have rights of parenthood and custody.

Texas law authorizes gestational agreements subject to certain restrictions:

Gestational Agreement Authorized

(a) A prospective gestational mother, her husband if she is married, each donor, and each intended parent may enter into a written agreement providing that:

....

(2) the prospective gestational mother, her husband if she is married, and each donor other than the intended parents, if applicable, relinquish all parental rights and duties with respect to a child conceived through assisted reproduction;

(3) the intended parents will be the parents of the child;

....

(a) The intended parents must be married to each other.⁵⁴

Thus it appears that Texas law would not authorize a gestational agreement where, as here, the intended parents (Flynn and Donich) were not married to each other. Moreover, Texas law contemplates that a gestational agreement be validated by a court.⁵⁵ That was not done in this case. In the absence of court validation, a gestational agreement is ineffective:

⁵²IND. CODE § 31-20-1-1 (2007).

⁵³*Id.* at § 31-20-1-2.

⁵⁴TEX. FAM. CODE ANN. § 160.754 (Vernon 2003).

⁵⁵*Id.* at §§ 160.755-56.

(a) A gestational agreement that is not validated as provided by this subchapter is unenforceable, regardless of whether the agreement is in a record.

(b) The parent-child relationship of a child born under a gestational agreement that is not validated as provided by this subchapter is determined as otherwise provided by this chapter.⁵⁶

The chapter otherwise provides that “[a] donor is not a parent of a child conceived by means of assisted reproduction.”⁵⁷ Thus, under Texas law, Jennifer Rice would not be the mother, which makes sense as she never intended to raise the triplets. Apparently, James Flynn would not be the father, leaving Danielle Bimber as the mother and presumably her husband, Douglas, as the father.

Ohio law addresses embryo donation as follows:

Birth mother regarded as natural mother

(A) A woman who gives birth to a child born as a result of embryo donation shall be treated in law and regarded as the natural mother of the child, and the child shall be treated in law and regarded as the natural child of the woman. No action or proceeding under this chapter shall affect the relationship.⁵⁸

However:

(E) This section deals with embryo donation for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her child.⁵⁹

There does not appear to be any statutory law in Ohio addressing the situation where, at the time the woman was impregnated it was not for the purpose or with the intention that she raise the resulting child or children as her own, but she later changes her mind and decides to keep the child or children.

Pennsylvania law, as will be seen, is silent on the subject of surrogacy.⁶⁰

III. FACTUAL FINDINGS OF THE COURT OF COMMON PLEAS OF ERIE COUNTY,
PENNSYLVANIA IN THE TRIPLETS CASE

The triplets’ journey through the courts began with Flynn filing a complaint against Mrs. Bimber in the Court of Common Pleas of Erie County, Pennsylvania, on December 11, 2003, seeking sole custody.⁶¹ That court eventually held at least four

⁵⁶ *Id.* at § 160.762.

⁵⁷ *Id.* at § 160.702.

⁵⁸ OHIO REV. CODE ANN. § 3111.97(A) (West 2006).

⁵⁹ *Id.* at § 3111.97(E).

⁶⁰ *J.F. v. D.B.*, 66 Pa. D. & C.4th, 1, 17 (C.P. Erie 2004). *See generally* Pennsylvania Domestic Relations Code, 23 PA. CONS. STAT. (1980).

⁶¹ *J.F. v. D.B.*, 66 Pa. D. & C.4th at 3; *Flynn v. Bimber*, 70 Pa. D. & C.4th 261, 263 (C.P. Erie 2005), *vacated sub nom.*, *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006).

days of hearings on the fate of the triplets.⁶² Mrs. Bimber filed an answer and counterclaim for custody.⁶³ Significantly, as it turned out, Jennifer Rice, the egg donor and a party to the surrogacy contract, was not made a party to the litigation.⁶⁴ Nor was Douglas Bimber,⁶⁵ despite the strong presumption in Pennsylvania that children born to a married woman are the children of her husband.⁶⁶ Nor was Eileen Donich,⁶⁷ despite her having been named in that contract as the triplets' mother if something should happen to Flynn.

Preliminarily, the Erie County Court issued an order granting temporary primary physical custody to Mrs. Bimber, but also providing five days a week “partial custody” to Flynn and Donich.⁶⁸ Ultimately Common Pleas Judge Shad Connelly issued two published opinions concerning the triplets, one on April 4, 2004⁶⁹ and one on January 7, 2005.⁷⁰ These opinions paint a picture of Flynn and Donich as being less than forthright regarding their own situation and Flynn in particular as demonstrating a curious lack of interest in the triplets. As found by Judge Connelly, the trier of fact, the following scenario played out in 2003.

In September 2003, SMI sent a letter to Hamot Medical Center that Mrs. Bimber, a surrogate mother planned to give birth to triplets at Hamot.⁷¹ The SMI letter said that Hamot should expect a court order (from some unspecified court), accompanying the intended parents, Flynn and Donich, that would give Flynn and Donich custody of the triplets after they were born.⁷²

When Mrs. Bimber went into labor on the morning of November 19, 2003, Flynn and Bimber were called and informed.⁷³ They arrived at Hamot that evening, but did

⁶²*J.F. v. D.B.*, 66 Pa. D. & C.4th at 3.

⁶³*Id.*

⁶⁴*Id.* at 4, n.4. The Pennsylvania Rules of Civil Procedure require a custody litigant to name the mother and father of the child as well as any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child. Pa. R. Civ. P. 1915.15. This rule implements a statutory requirement found in the Pennsylvania Domestic Relations Code, 23 PA. CONS. STAT. § 5425 (1980).

⁶⁵*See J.F. v. D.B.*, 66 Pa. D. & C.4th at 3.

⁶⁶*E.g. John M. v. Paula T.*, 571 A.2d 1380, 1383 (Pa. 1990) (explaining that the presumption that a child born to a married woman is her husband's child is “one of the strongest presumptions known to the law.”)(citation omitted).

⁶⁷*J.F. v. D.B.*, 66 Pa. D. & C.4th at 20.

⁶⁸*Id.* at 3. Under the Pennsylvania Domestic Relations Code, 23 PA. CONS. STAT. § 5302 (1980), “physical custody” is “the actual physical possession and control of a child,” and “partial custody” is “the right to take possession of a child away from the custodial parent for a certain period of time.”

⁶⁹*J.F. v. D.B.*, 66 Pa. D. & C.4th at 1.

⁷⁰*Flynn v. Bimber*, 70 Pa. D. & C.4th 261 (C.P. Erie 2005), *vacated sub nom.*, *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006).

⁷¹*J.F. v. D.B.*, 66 Pa. D. & C.4th at 5.

⁷²*Id.*

⁷³*Id.* at 6.

not have a court order with them.⁷⁴ Over the next few days, Donich maintained phone contact with the Hamot NICU staff.⁷⁵ Flynn remained in the background, but did buy a mini-van with three child seats, plus other items for the triplets.⁷⁶ On Saturday, November 22, Mrs. Bimber was discharged from Hamot, but the triplets remained in the hospital.⁷⁷ That day, Donich called Mrs. Bimber and said that she and Flynn were very busy.⁷⁸

On Monday, November 24, Donich called Hamot to schedule sleep apnea monitor training.⁷⁹ She also called Mrs. Bimber and told Mrs. Bimber that she and Flynn had visited the triplets over the prior weekend. The following day, Tuesday, November 25, Mrs. Bimber called the Hamot NICU and learned that Flynn and Donich had not visited the triplets that weekend.⁸⁰ Mrs. Bimber called SMI to express her concern about this.⁸¹

Also on November 25, Donich called Hamot for an update and said that she and Flynn would arrive at Hamot that evening.⁸² That same day, Mrs. Bimber returned to Hamot and met with various personnel there.⁸³ She expressed her concern about the fact that Flynn and Donich hadn't visited the triplets since their original visit and hadn't selected names for the triplets, and that Donich had lied about having visited them over the weekend.⁸⁴ Mrs. Bimber decided that she would take the triplets home with her.⁸⁵ Accordingly, as the triplets' birth mother, she revoked her consent for Flynn and Donich to visit them.⁸⁶

When Flynn and Donich arrived at Hamot that evening as planned, they were met by hospital security.⁸⁷ They were not allowed to visit and indeed were informed, falsely, that the triplets had been discharged.⁸⁸ Upon their return to Ohio, they tried to call Mrs. Bimber to find out what was going on, but were only able to leave a message on her answering machine.⁸⁹ However, SMI director Steven Litz did get

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.* at 7.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.* at 8.

⁸⁸*Id.* An employee later testified that Flynn and Donich were given this misinformation for "safety reasons." *Id.* at 8, n.6.

⁸⁹*Id.* at 8.

them a message that Mrs. Bimber had changed her mind and intended to keep the triplets.⁹⁰

Two days after Hamot personnel told Flynn and Donich that the triplets had been discharged to Mrs. Bimber, Hamot did actually discharge the triplets to her.⁹¹ This was Thursday, November 27.⁹²

Between November 27 and December 11, Flynn and Donich left two phone messages for Mrs. Bimber, but she did not return those messages.⁹³ They did not attempt to visit the triplets during this period, later claiming that they did not know where the triplets were.⁹⁴

After Flynn sued Danielle Bimber for custody of the triplets on December 11, 2003, Erie County Judge Trucilla issued an order granting temporary custody to Bimber.⁹⁵ Although that order permitted Flynn and Donich to visit the triplets five times a week,⁹⁶ Judge Connelly subsequently found in April 2004 that they had only exercised that right two or three times a week.⁹⁷ Flynn and Donich testified that Mrs. Bimber often cut the visits short, while Mrs. Bimber complained that Flynn did not really interact with the triplets during the visits.⁹⁸

Judge Connelly found Flynn less than forthright on many subjects. Although “[Flynn] testified that he live[s] with . . . Donich, in her home located in Kirtland, Ohio . . . [his] tax returns and legal pleadings filed in Ohio list his address as an apartment in Copley, Ohio.”⁹⁹ Flynn alternated at hearings “between complaining about the amount of money he ha[d] spent in legal costs and boasting about the affluent neighborhood and schools of his alleged home in Kirtland, Ohio.”¹⁰⁰ Although he referred to Donich as his fiancée, he made it clear that they could not marry because she would lose the death benefits pension she receives and they “really need the money.”¹⁰¹ It appeared that Donich, rather than Flynn, was

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.* at 3.

⁹⁶*Id.*

⁹⁷*Id.* at 8. However, the judge failed to note that such visits entailed a roughly four hour long round trip. Donich lives in Kirtland, Ohio. *Flynn v. Bimber*, 70 Pa. D. & C.4th 261, 266 n.2 (C.P. Erie 2005), *vacated sub nom.*, *J.F. v. D.B.* 897 A.2d 1261 (Pa. Super. Ct. 2006). The Bimbers live in Corry, Pennsylvania. *Id.* at 264. According to Mapquest.com, it is a 104 mile drive between these two locations, which should take 1 hour, 52 minutes, *Driving Directions from Kirtland, OH to Corry, PA*, <http://www.mapquest.com/directions> (in the starting location section, type “Kirtland” in the city field and “OH” in the state field, then, in the ending location section type “Corry” in the city field and “PA” in the state field).

⁹⁸*J.F. v. D.B.*, 66 Pa. D. & C.4th at 8-9.

⁹⁹*Flynn*, 70 Pa. D. & C.4th at 266, n.2.

¹⁰⁰*Id.* at 266 (footnote omitted).

¹⁰¹*Id.*

primarily responsible for the triplets' care during periods when they had partial custody of the triplets.¹⁰² Sometimes during these visits, Donich was simultaneously taking care of her four grandchildren.¹⁰³

IV. ERIE, PENNSYLVANIA, OPINION I: STANDING (APRIL 2004)

In his first published opinion, issued on April 2, 2004, Erie County Court of Common Pleas Judge Connelly had to determine who did and who did not have standing to assert custodial rights.¹⁰⁴ Flynn had sued Mrs. Bimber for custody, and she had counterclaimed.¹⁰⁵ But simply because Flynn had properly named Mrs. Bimber as a party in the custody litigation did not mean that she necessarily had a right to claim a custodial interest in the triplets.¹⁰⁶ There was no question that Mrs. Bimber was not biologically related to them; their biological mother was Jennifer Rice,¹⁰⁷ but Rice had not (as yet) come forward to assert maternal rights.

Flynn argued that Mrs. Bimber was not the biological or legal mother of the triplets and, in any event, had agreed in the surrogacy contract to surrender to Flynn any custody rights she might have with regard to the triplets.¹⁰⁸ If the surrogacy contract was found to be valid and binding, Flynn would prevail as a matter of contract law.

Judge Connelly was confronted with a legal vacuum in the Commonwealth of Pennsylvania with regard to surrogacy agreements. No Pennsylvania statute directly addresses surrogacy.¹⁰⁹ The only previously reported Pennsylvania case on surrogacy, *Huddleston v. Infertility Center*, involved a tort action by a surrogate mother against the agency which had arranged the surrogacy contract involving her and the sperm donor father, who ultimately killed the child she had carried.¹¹⁰ *Huddleston* had no direct bearing on the instant case.¹¹¹

Judge Connelly conducted a brief survey of American law on surrogacy, and, not surprisingly, found it to be in disarray.¹¹² Nineteen states have neither statutory nor case law on the subject.¹¹³ Sixteen states have made surrogacy itself or surrogacy contracts illegal.¹¹⁴ New Jersey prohibits paid surrogacy contracts, but free

¹⁰²*Id.* at 268.

¹⁰³*Id.*

¹⁰⁴*J.F. v. D.B.*, 66 Pa D. & C.4th 1, 3 (C.P. Erie 2004).

¹⁰⁵*Id.*

¹⁰⁶*Van Coutren v. Wells*, 633 A.2d 1214, 1216 (Pa. 1993).

¹⁰⁷DNA testing demonstrated a 99.98-99.99% probability that Rice and Flynn are the biological parents of the triplets. *Rice v. Flynn*, 2005-Ohio-4667, ¶ 10.

¹⁰⁸*J.F. v. D.B.*, 66 Pa. D. & C.4th at 17-24.

¹⁰⁹*Id.* at 12-13.

¹¹⁰700 A.2d 453 (Pa. Super. Ct. 1997).

¹¹¹*J.F. v. D.B.*, 66 Pa. D. & C.4th at 10-12.

¹¹²*Id.* at 13-17.

¹¹³*Id.* at 13.

¹¹⁴*Id.*

surrogacy volunteers are permitted.¹¹⁵ There are also "[s]even states [that] generally allow surrogacy, with or without a contract, fees, etc."¹¹⁶

Several states have idiosyncratic statutory schemes. According to Judge Connelly, "Illinois allows all 'parents' to be listed on [the] birth certificate, including the surrogate mother or gestational surrogate, the intended parents, the biological parents, and/or sperm and egg donors."¹¹⁷

Judge Connelly expressed concern about certain specific aspects of the surrogacy contract in this case:

[C]ontractual inconsistencies and the failure to name a legal mother for these children greatly trouble the court. Section 3 and the Release and hold harmless agreement contradict each other when [Mrs. Bimber] agrees that she *intends* to terminate her rights and then agrees that she *will* surrender her rights. Sections 9 and 20, 20 and 21, 15 and 20, and 9 and 20 are in conflict with each other in that section 20 says [Flynn] will be legally responsible for the children but the other sections undermine that responsibility by allowing it to "cease" or be "indemnified." At no time does the contract state who the legal mother of the children shall be, particularly if something were to happen to [Flynn] and [Donich], or if they were to decide not to take custody of the children.¹¹⁸

Judge Connelly then turned to well-settled case law in Pennsylvania which establishes that a parent cannot "bargain away rights belonging to children."¹¹⁹ The typical scenario is a woman who, either actually or allegedly, tells a man that if he will get her pregnant, she will never sue him for child support. Such a bargain is normally unenforceable.¹²⁰

According to Judge Connelly, the surrogacy agreement purported to have the same effect as an agreement by a woman to absolve a man who gets her pregnant of the duty to pay child support.¹²¹ "The court therefore declares the surrogacy contract entered into by the parties to be void as against public policy because it does not provide for a legal mother for the triplets and it allows the parties to bargain away the children's custody and support rights."¹²²

This reasoning is questionable on a number of bases. First, although there is a remarkable lack of explicit authority on the point, it is perfectly legal in Pennsylvania for a single woman to receive artificial insemination through a sperm

¹¹⁵*Id.* This is no doubt the direct result of *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).

¹¹⁶*J.F. v. D.B.*, 66 Pa. D. & C.4th at 13.

¹¹⁷*Id.* at 14.

¹¹⁸*Id.* at 19.

¹¹⁹*Id.* at 21.

¹²⁰*Id.* at 21-22 (citing *Sams v. Sams*, 808 A.2d 206 (Pa. Super. Ct. 2002), *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000). *But see*, *Ferguson v. McKiernan*, 60 Pa. D. & C.4th 353 (C.P. Dauphin 2002), *rev'd*, No. 16 MAP 2005, 2007 WL 4555436 (Pa. 2007)) (creating exception for donor who provides sperm in a clinical setting for in vitro fertilization).

¹²¹*Id.* at 22.

¹²²*Id.*

bank from an anonymous donor, which creates a child with no legal father. Second, custody rights are deemed to be the rights of a parent, not of a child. Indeed in the very next paragraph of his opinion, Judge Connelly states, “The contract allowed [Mrs. Bimber] to sign away *her* custodial rights”¹²³ Third, although the surrogacy contract specifically provided that “this agreement shall be governed by and enforced in accordance with the laws of the State of [Ohio],”¹²⁴ Judge Connelly did not purport to do so, nor to explain why he was not doing so. Fourth, the reasoning ignores the most obvious basis for voiding a contract whereby a woman is paid significant money for turning over her rights to a child she has carried: the rules against baby selling. Other courts have struck down surrogacy contracts on this basis, most notably the New Jersey Supreme Court in the *Baby M.* case.¹²⁵

Of course, Judge Connelly’s voiding of the surrogacy contract did not, by itself, resolve the question of whether Mrs. Bimber possessed any custodial rights. So, Judge Connelly turned to the question of who exactly is the legal mother of the triplets.¹²⁶ There were three possible candidates: the egg donor, Jennifer Rice; Flynn’s paramour/fiancée, Eileen Donich; and their surrogate mother, Danielle Bimber.

Judge Connelly proceeded by a process of elimination. He found that Rice could not be the legal mother solely “because she is not a party to this action.”¹²⁷ Again, this reasoning seems flawed. It suggests that a biological parent can lose parental rights simply because a contestant fails to name him or her as a party to custody litigation.

Next, Judge Connelly found that Donich is not the legal mother: “It cannot be [Donich] who is not genetically related to them, nor is she even married to [Flynn]. She has contributed nothing more than her presence and her interest in the triplets.”¹²⁸ This reasoning overlooks the fact, that while the surrogacy contract could have been more explicit on the point, clearly the original intention of all concerned was for Donich to become the mother by adoption of any children resulting from the surrogacy. In other surrogacy cases, courts have found parenthood based on intention. For example, in the *Buzzanca* case,¹²⁹ an appellate court in California found that a formerly married couple, who had agreed to have an embryo which was not biologically related to either of them implanted in a surrogate mother, were the legal parents of the resulting child because that was their original intention. After their marriage broke up, the husband had argued unsuccessfully that he had no paternal obligations.

¹²³*Id.* (emphasis added).

¹²⁴*See supra* note 40 and accompanying text.

¹²⁵*In re Baby M.*, 537 A.2d 1227 (N.J. 1988). Of course, in the *Baby M.* case, the surrogate mother was also the biological mother. For a similar result, *see R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998).

¹²⁶*J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 23-24 (C.P. Erie 2004).

¹²⁷*Id.*

¹²⁸*Id.* at 24.

¹²⁹*Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

Having eliminated the egg donor and the paramour/fiancée of the sperm donor as legal mother, Judge Connelly was left with only the surrogate mother, Danielle Bimber.

That leaves [Danielle Bimber], who like [Donich] is not genetically related to the triplets, but carried them in her womb and then gave birth to them. Her every decision prior to their birth has affected them – health, nutrition, prenatal care, etc. In addition, she has not terminated any parental rights she may have to the triplets. She has instead taken the triplets into her home and cared for them along with her three other children. She is more a mother and a parent by her actions than by genetics. She has assumed “maternity” if there were such a legal definition as there exists for “paternity.” Since the contract is void because it does not provide for a legal mother, the court finds [Danielle Bimber] to be the legal mother of the triplets since she carried and bore them and has taken care of them as a natural parent would.¹³⁰

Perhaps realizing that his conclusion that Danielle Bimber is the triplets’ legal mother rested on rather shaky legal foundations, Judge Connelly found an alternative basis for granting her standing to assert custodial rights. He found that she “most likely” stood “in loco parentis” to the triplets.¹³¹

The “in loco parentis” doctrine allows a non-parent who has acted in the place of a parent to have standing in the place of a parent in a subsequent custody dispute. The problem with granting Mrs. Bimber “in loco parentis” standing was that an essential element of this status is that one cannot have acted in defiance of a parent’s wishes.¹³² Thus if a parent turns a child over to, say, her aunt to care for and then disappears for an indefinite period of time, the aunt would be acting in loco parentis. But, if the aunt simply snatched the child from the parent’s chosen babysitter, the aunt would not be in loco parentis.

Clearly Mrs. Bimber had taken the triplets in defiance of their father’s wishes. Conflating the standing issue with a best interests analysis, Judge Connelly found that Flynn and Donich had shown a lack of consistent interest in the triplets in a variety of ways and had failed to exhaust all legal avenues to obtain their return.¹³³ Accordingly, he concluded that Mrs. Bimber had not truly acted in defiance of Flynn’s wishes.

Again, this analysis is hardly convincing, especially in light of the legal battle Flynn was pursuing in Pennsylvania (and, by then as will be seen, also in Ohio) to obtain the triplets. Perhaps a more cogent, if novel, rationale would have been that Mrs. Bimber acquired in loco parentis standing when, with the concurrence of all

¹³⁰*J.F.*, 66 Pa. D. & C.4th at 24.

¹³¹*Id.* Elsewhere in the same opinion, Judge Connelly definitively concludes that Danielle Bimber “has standing in loco parentis to pursue both custody and child support for [the triplets].” *Id.* at 32 (emphasis added).

¹³²*See* B.A. v. E.E. ex rel C.E., 741 A.2d 1227, 1229 (Pa. 1999) (citing *Gradwell v. Strausser*, 610 A.2d 999, 1003 (Pa. Super. Ct. 1992)).

¹³³*J.F.*, 66 Pa. D. & C.4th at 29-32.

interested parties, she took custody *in utero* of the three embryos that developed into the triplets.

In any event, Judge Connelly concluded that Mrs. Bimber had standing to maintain her custody counterclaim and that Flynn had a legal duty to provide child support.¹³⁴ He referred both matters, custody and support, to conferences before those agencies of the county court which usually deal with such issues in the first instance.¹³⁵

V. SUMMIT COUNTY, OHIO, OPINION ON PARENTHOOD AND PARENTING (OCTOBER 2004)

On April 22, 2004, twenty days after the Erie, Pennsylvania, Court ruled that Jennifer Rice, the egg donor, was not the triplets' mother, Jennifer Rice filed suit against Flynn and the Bimbers in the Summit County Ohio Court of Common Pleas, seeking a determination of a mother-child relationship between herself and the triplets.¹³⁶ She also sought a declaration that the Bimbers had no parental rights with respect to the children.¹³⁷ Flynn, a nominal defendant, admitted all of Rice's allegations, and also sought a declaration that the Bimbers had no parental rights.¹³⁸

The Bimbers acknowledged that Flynn was the triplets' biological father but asserted they lacked sufficient information to know whether Rice was the biological mother.¹³⁹ Accordingly, as previously noted, DNA testing was performed and demonstrated a 99.98-99.99% probability that Flynn and Rice were the triplets' biological parents.¹⁴⁰

In essence, the Ohio litigation was a fight over two issues: parenthood of the triplets (i.e. who are their legal parents) and parenting of the triplets (i.e. who is entitled to what rights of custody, visitation and access to the triplets). But, before the Ohio court could address either of these issues, it first had to determine whether it had jurisdiction to do so or was barred by the earlier orders from the Pennsylvania court. This question has federal constitutional dimensions, as the Full Faith and Credit Clause of the United States Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.¹⁴¹

¹³⁴*Id.* at 33.

¹³⁵*Id.*

¹³⁶Complaint at 3, *Rice v. Flynn*, No. 2004-04-1561 (Ohio Ct. Com. Pl. Summit Apr. 22, 2004).

¹³⁷*Id.*

¹³⁸Answer, Counterclaim, and Cross-claim of Defendant, J.F., *Rice v. Flynn*, No. 2004-04-1561 (Ohio Ct. Com. Pl. Summit June 4, 2004).

¹³⁹Defendants D.B. and D.B.'s Answer to Complaint, *Rice v. Flynn*, No. 2004-04-1561 (Ohio Ct. Com. Pl. Summit June 14, 2004).

¹⁴⁰*See supra* note 107.

¹⁴¹U.S. Const. art. IV, § 1.

The Congress has enacted a general law to implement the Full Faith and Credit Clause as it pertains to custody determinations; that law is the Parental Kidnapping Prevention Act (PKPA).¹⁴² The PKPA was intended to prevent a parent who is unhappy with a custody determination issued in State A from trying to relitigate the case in State B in order to get a more favorable result. The Congress wanted to ensure that two States would not issue inconsistent custody orders with regard to the same children.¹⁴³

Additionally, the States have endeavored through their legislatures to enact uniform laws governing jurisdictional disputes in custody cases. The National Conference of Commissioners on Uniform State Laws (NCCUSL) has addressed this matter twice. First, in 1968, NCCUSL proposed the Uniform Child Custody Jurisdiction Act (UCCJA), which was eventually enacted in all States.¹⁴⁴ Then, in 1997, NCCUSL proposed a similar, but strengthened and clarified law, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),¹⁴⁵ which forty-six States plus the District of Columbia and the U.S. Virgin Islands have now enacted to replace the UCCJA.¹⁴⁶

Mrs. Bimber asserted that the PKPA and UCCJA prohibited Ohio from making a parenting decision and that Rice's entire case should be dismissed.¹⁴⁷

On October 29, 2004, Summit County Court Judge John P. Quinn issued his decision that, not unlike King Solomon, split the difference.¹⁴⁸ Regarding the existence of a parent-child relationship, Judge Quinn found one to exist between Rice and the triplets, and one to exist between Flynn and the triplets.¹⁴⁹ However, Judge Quinn was unwilling to rule out, or rule on, the existence of a parent-child relationship between Mrs. Bimber and the triplets.¹⁵⁰ That matter, said the judge, was subject to the continuing exclusive jurisdiction of the Pennsylvania court.¹⁵¹ Thus, Judge Quinn's decision left the triplets in the anomalous position of having

¹⁴²28 U.S.C. § 1738A (2006).

¹⁴³See *Thompson v. Thompson*, 484 U.S. 174, 177, 180-83 (1988) ("As the legislative scheme suggests, and as Congress explicitly specified, one of the chief purposes of the PKPA is to 'avoid jurisdictional competition and conflict between State courts.'")

¹⁴⁴The National Conference of Commissioners on Uniform State Laws, *Why States Should Adopt the Uniform Child Custody Jurisdiction and Enforcement Act*, http://www.nccusl.org/Update/uniformact_why/uniformacts-why-uccjea.asp (last visited Aug. 12, 2007).

¹⁴⁵*Id.*

¹⁴⁶See NCCUSL.org, *Final Push for Nationwide Enactment of UCCJEA: South Carolina Joins 45 Other States with Enactment of Important Child Custody Bill*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp. (last visited Feb. 9, 2008).

¹⁴⁷Defendants D.B.'s and D.B.'s Opposition to Plaintiff's Motion for Summary Judgment and Motion for Summary Judgment, *Rice v. Flynn*, No. 2004-04-1561 (Ohio Ct. Com. Pl. Summit Sept. 30, 2004)

Rice v. Flynn, *supra* note 107, at **6, para. 12.

¹⁴⁸*Rice v. Flynn*, No. 2004-04-1561 (Ohio C.P. Summit May 12, 2006).

¹⁴⁹*Id.*, slip. op. at 5.

¹⁵⁰*Id.*, slip. op. at 6.

¹⁵¹*Id.*

one legal father (Flynn), as well as two legal mothers (Jennifer Rice in Ohio and Danielle Bimber in Pennsylvania), neither of whom ironically had been intended to be their mother under the surrogacy contract.

With regard to the parenting (i.e. custody) determination, Judge Quinn likewise found that Ohio lacked jurisdiction, as that matter lay within the continuing exclusive jurisdiction of the Court of Common Pleas of Erie County, Pennsylvania.¹⁵²

Both Rice and the Bimbers appealed various aspects of this decision to the Court of Appeals of Ohio.¹⁵³

VI. THE BANKRUPTCY COURT WEIGHS IN, AND BOWS OUT (DECEMBER 2004)

The litigation over the “surrogate triplets” generated significant media attention, one indirect result of which was that the bankruptcy trustee who had been assigned Mrs. Bimber’s 2003 bankruptcy action filed a complaint in the Bankruptcy Court to revoke the financial discharge that court had granted her.¹⁵⁴ The trustee argued that Mrs. Bimber’s failure to reveal to the Bankruptcy Court the surrogacy contract she had signed in 2002 and the \$24,000 she was to receive under it justified revocation.¹⁵⁵

Mrs. Bimber argued that the surrogacy contract was either void or voidable and that, even though she had already received \$1,000, she would not receive any additional compensation under the contract until the children were born.¹⁵⁶ Moreover, she was granted her bankruptcy discharge in October 2003, one month before the triplets’ birth.¹⁵⁷

In a very brief opinion, filed in December 2004, the Bankruptcy Court denied the trustee’s request to revoke Mrs. Bimber’s discharge of debt.¹⁵⁸ The bankruptcy judge cited with approval authority indicating that a contract for personal services is not part of the bankruptcy estate.¹⁵⁹ Thus, even if Mrs. Bimber should have disclosed the surrogacy contract to the bankruptcy court, her failure to do so did not prejudice the bankruptcy procedure.¹⁶⁰

VII. ERIE PENNSYLVANIA OPINION II: CUSTODY (JANUARY 2005)

After various intermediate steps, the issue of custody of the triplets, and various related matters, returned to the Court of Common Pleas of Erie County,

¹⁵²*Id.* slip. op. at 4.

¹⁵³*See* Notice of Cross Appeal, *Rice v. Flynn*, No. 2004-04-1561 (Ohio Com. Pl. Summit Dec. 2, 2004); Defendants, Danielle Bimber and Douglas Bimber’s Notice of Appeal, *Rice v. Flynn*, No. 2004-04-1561 (Ohio Ct. Com. Pl. Summit Nov. 24, 2004)

¹⁵⁴*In re Bimber*, 318 B.R. 297–297 (Bankr. W.D. Pa. 2004).

¹⁵⁵*Id.* at 298.

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸*Id.* at 300.

¹⁵⁹*Id.* at 299.

¹⁶⁰*Id.* at 300.

Pennsylvania, and on January 7, 2005, Judge Connelly issued his second published decision regarding the triplets.¹⁶¹

The fact that Judge Connelly had previously found Mrs. Bimber not only to have “in loco parentis” standing, but also to be the triplets’ legal mother, had significant implications for deciding custody on the merits. Where a custody battle is between two parents, “the burden of proof is shared equally by the contestants.”¹⁶² But where a custody fight is between a parent and a non-parent who has been granted in loco parentis status, the evidentiary scale is “tipped hard to the biological parent’s side.”¹⁶³

Judge Connelly reviewed much of the territory covered in his April 2004 opinion.¹⁶⁴ In addition to testimony from the parties, there was presented on behalf of Flynn the deposition of Amy Hokaj, a licensed independent social worker in Ohio who works as an “adoption assessor” for Adoption Circle, a private agency.¹⁶⁵ Hokaj had been hired by Donich to perform home studies precedent to an adoption of the triplets by Donich in Ohio.¹⁶⁶ Hokaj found Donich’s home to be adequate for raising the triplets.¹⁶⁷

Judge Connelly was concerned, however, about various inadequacies he perceived in Hokaj’s home study.¹⁶⁸ Hokaj only addressed Flynn and Donich as parents and did not compare them to the Bimbers.¹⁶⁹ Judge Connelly noted inconsistencies between Hokaj’s report and other information.¹⁷⁰ For example, Donich had stated that she was being treated for osteoporosis on the medical statement of foster/adoptive applicant section of Hokaj’s report, but denied she had osteoporosis at trial.¹⁷¹ Flynn told Hokaj he was an only child, but elsewhere acknowledged that he has a younger sister.¹⁷²

Judge Connelly expressed other concerns about Flynn and Donich. For example, they both refused to use the triplets’ legal names;¹⁷³ and, at trial, Flynn referred to them using terms such as “this one” and “that one.”¹⁷⁴

¹⁶¹Flynn v. Bimber, 70 Pa. D. & C.4th 261 (C.P. Erie 2005), *vacated sub nom.*, J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct. 2006).

¹⁶²Charles v. Stehlik, 744 A.2d 1255, 1258 (Pa. 2000).

¹⁶³T.B. v. L.R.M., 786 A.2d 913, 919 n.8 (Pa. 2001); *Charles*, 744 A.2d at 1258.

¹⁶⁴*Flynn*, 70 Pa. D. & C.4th at 286-88.

¹⁶⁵*Id.* at 269.

¹⁶⁶*Id.* at 269-70.

¹⁶⁷*Id.* at 272.

¹⁶⁸*Id.* at 272-73.

¹⁶⁹*Id.* at 272.

¹⁷⁰*Id.* at 273.

¹⁷¹*Id.*

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴*Id.* at 274.

Before turning to his decision on the merits, Judge Connelly addressed the jurisdictional issues raised in his court and the Ohio courts.¹⁷⁵ Citing both the UCCJA and its successor, the UCCJEA, as well as the PKPA, Judge Connelly found that Pennsylvania has jurisdiction.¹⁷⁶ It was the triplets' "home state" within the meaning of those statutes.¹⁷⁷

Again Judge Connelly addressed the status of the egg donor, Rice.¹⁷⁸ He explained that in his April 2004 opinion he had treated her as he would have treated an anonymous sperm donor.¹⁷⁹ She had only come forward after that opinion was issued, by asserting parental rights in Ohio.¹⁸⁰ She never sought to assert such rights in the Pennsylvania litigation although she was clearly aware of that litigation.¹⁸¹ Since a custody determination had to be made, Judge Connelly decided to do so without Rice's involvement.¹⁸² Judge Connelly noted that "[i]f Rice truly wants to become involved, the court can amend its custody order and join her as a party at a later date."¹⁸³ Thus, like Judge Quinn in Ohio, Judge Connelly in Pennsylvania left open the possibility that the triplets might end up with two legal mothers, as well as a father.

On the merits, Judge Connelly concluded that as between Flynn and Mrs. Bimber, Mrs. Bimber "is the better caretaker by far, and primary custody should remain with her."¹⁸⁴ Although she had not initially intended to raise the triplets, she had stepped in when she and personnel at Hamot perceived that Flynn and Donich exhibited an extraordinary lack of interest in the newborns.¹⁸⁵ She was the triplets' "primary caretaker."¹⁸⁶

¹⁷⁵*Id.* at 274-88.

¹⁷⁶*Id.* at 276.

¹⁷⁷*d.* at 277.

¹⁷⁸*Id.* at 274-86.

¹⁷⁹*Id.* at 285.

¹⁸⁰*Id.*

¹⁸¹*Id.* at 284 n.7, 285.

¹⁸²*Id.* at 286.

¹⁸³*Id.*

¹⁸⁴*Id.* at 291.

¹⁸⁵*Id.*

¹⁸⁶*Id.* at 291-92. The "primary caretaker" rule was first articulated in the Pennsylvania appellate courts in *Commonwealth ex rel. Jordan v. Jordan*, 448 A.2d 1113, 1115 (1982). That court held that:

where two natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker. Not to do so ignores the benefits likely to flow to the child from maintaining day to day contact with the parent on whom the child has depended for satisfying his basic physical and psychological needs.

Id. 1115 (footnote omitted).

By contrast, Judge Connelly was critical of the fact that when the triplets spend time with Flynn and Donich they take the children out to many places, mostly to show them off in public.¹⁸⁷ Judge Connelly explained that "[w]hile the court does not condemn occasional outings, it does recognize the children's need for a stable home environment surrounded by loving family, not curious strangers."¹⁸⁸

Of course, much of Judge Connelly's praise of Mrs. Bimber and criticism of Flynn and Donich stem from the natural consequences of Mrs. Bimber having been awarded temporary custody of the triplets by the Erie County court shortly after their birth. Had Flynn and Donich won temporary custody, assuredly they would have become the triplets' primary caretakers who would have attended to their medical needs, etc. While they might not have been as "hands on" as Mrs. Bimber, there was no evidence that they would have been unable or unwilling to attend to the triplets' basic needs. Indeed, Judge Connelly proceeded to award Flynn extensive periods of partial custody,¹⁸⁹ including every weekend from Friday evening to Sunday evening, a seven-day vacation period, and shared holidays.¹⁹⁰ Such an order would obviously have been completely inappropriate had Judge Connelly found that Flynn and Donich's care was detrimental to the triplets' best interests.

Judge Connelly also addressed two related matters: the triplets' names and child support. Mrs. Bimber had named the children Matthew, Mark, and Micah Bimber six days after they were born, and those names were placed on their birth certificates.¹⁹¹ While Flynn had not specifically petitioned to change their names, he and Donich maintained that the triplets were Easton, Lance, and Shane Flynn.¹⁹²

Judge Connelly treated this question as though a name change petition had been filed. Under Pennsylvania law, a person petitioning to change a child's name must show why the proposed new name is better than the current name and in the child's best interests.¹⁹³ The judge concluded that Flynn had had "more than ample opportunity to provide names for the children" when they were born, but had failed to do so.¹⁹⁴ Mrs. Bimber named them by default, when they were six days old, as the only alternative to continuing to refer to them as Baby A, B and C.¹⁹⁵

The judge quite properly found that it was contrary to the triplets' best interests to be called by two different sets of names.¹⁹⁶ This could only cause them

¹⁸⁷*Flynn*, 70 Pa. D. & C.4th at 292.

¹⁸⁸*Id.*

¹⁸⁹*See* 23 PA. CONS. STAT. ANN. § 5302 (West 2007) ("The right to take possession of a child away from the custodial parent for a certain period of time.")

¹⁹⁰*Flynn*, 70 Pa. D. & C.4th at 310-11.

¹⁹¹*Id.* at 302.

¹⁹²*Id.*

¹⁹³*Id.* *See In re Grimes*, 609 A.2d 158, 161 (Pa. 1992); *In re C.R.C.*, 819 A.2d 558, 560 (Pa. Super. Ct. 2003).

¹⁹⁴*Flynn*, 70 Pa. D. & C.4th at 304.

¹⁹⁵*Id.*

¹⁹⁶*Id.*

“confusion and uncertainty.”¹⁹⁷ Judge Connelly reasoned that “[b]y choosing to delay, [Flynn] must now accept the names Matthew, Mark and Micah as the names of the children,” use those names and be responsible for making sure that those around him do likewise.¹⁹⁸ However, since Flynn is the triplets’ father, and although Flynn did not specifically ask the court to do so, Judge Connelly ordered that the triplets’ last name be changed from Bimber to Flynn.¹⁹⁹

Although the judge criticized Flynn for having failed to name the triplets during the first six days of their lives, it is at best unclear under Pennsylvania law what would have happened had Flynn tried to give them the names he intended and Mrs. Bimber had tried to give them her preferred names. Pennsylvania simply does not address this situation. Under one regulatory provision, “[t]he child of a married woman and a man who is not the mother’s husband, may be registered as the child of the biological father if” her husband does not object.²⁰⁰ But this does not answer who has naming rights, nor, indeed, who is the mother in the case of gestational surrogacy. Normally, where a child is born to a married couple in Pennsylvania, they share naming rights with each other, unless they are “divorced or separated at the time of the child’s birth,” in which case “the choice of surname rests with the parent who has custody of the newborn child.”²⁰¹ Pennsylvania law provides that “[t]he child of an unmarried woman may be registered with any surname requested by the mother.”²⁰²

Finally, Judge Connelly incorporated into the decision a previously entered order directing Flynn to pay child support to Mrs. Bimber.²⁰³ Flynn appealed to the Pennsylvania Superior Court.²⁰⁴

VIII. SUMMIT COUNTY, OHIO, COURT ADDRESSES VALIDITY OF SURROGACY CONTRACT (MAY 2005)

In 2004, Flynn brought an action against both Danielle and Douglas Bimber in the Court of Common Pleas of Summit County, Ohio, sounding in breach of contract.²⁰⁵ He demanded return of all funds he had paid in connection with the surrogacy agreement and all child support he had already paid pursuant to the Pennsylvania court order, plus attorney fees.²⁰⁶

In a brief decision issued on May 11, 2005, the Summit County Court denied Flynn relief and entered judgment for the Bimbers.²⁰⁷ Judge Mary F. Spicer reasoned

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹*Id.* at 304-5.

²⁰⁰28 PA. CODE § 1.5 (2007).

²⁰¹*Id.* at § 1.7.

²⁰²*Id.* at § 1.6.

²⁰³*Flynn*, 70 Pa. D. & C.4th at 314.

²⁰⁴*J.F. v. D.B.*, 897 A.2d 1261, 1265 (Pa. Super. Ct. 2006).

²⁰⁵*J.F. v. D.B.*, Summit No. CV 04 02 1218 slip op. at 1-2 (Ohio C.P. May 11, 2005).

²⁰⁶*Id.* at 2.

²⁰⁷*Id.* at 7.

that a parent cannot contract away her parental rights.²⁰⁸ Although an Ohio court might have reached a different result, the Erie County, Pennsylvania, Court had concluded that Mrs. Bimber was the triplets’ legal mother.²⁰⁹ Therefore, any provision in the surrogacy contract that required Mrs. Bimber to relinquish her parental rights was simply unenforceable.²¹⁰ Similarly, it is settled in Ohio that, “[a] father cannot, by contract, escape his responsibility for adequate support of a minor child.”²¹¹ Accordingly, the contract’s provision for reimbursement of child support was also unenforceable.²¹² Flynn appealed this decision also.²¹³

IX. ERIE COUNTY, PENNSYLVANIA, COURT TERMINATES EGG DONOR’S PARENTAL RIGHTS (JUNE 2005)

In his January 2005 opinion, Judge Connelly left open the possibility of subsequently granting parental rights to Jennifer Rice, the egg donor.²¹⁴ Five months later, however, in June 2005, the judge filed a “journal entry” in the Erie County Court docket terminating her parental rights to the triplets.²¹⁵ This set up a direct conflict with the Summit County, Ohio, Court’s October 2004 decision declaring Rice to have a parent-child relationship with the triplets.

X. FURTHER CONFLICTS: THE OHIO COURT OF APPEALS (SEPT. 2005)

In September 2005, the Ohio Court of Appeals (Ninth Appellate District) reviewed Summit County Judge Quinn’s October 2004 decision, which had granted Jennifer Rice a parent-child relationship with the triplets but deferred to Pennsylvania on the issues of Mrs. Bimber’s rights as a parent and custodial arrangements for the triplets.²¹⁶

Rice argued that the trial court should not have found that it lacked jurisdiction to address the Bimbers’ legal rights vis-à-vis the triplets.²¹⁷ Under the federal Parental Kidnapping Prevention Act (PKPA), for a state’s custody determination to be entitled to full faith and credit, “reasonable notice and opportunity to be heard shall be given to the contestants, [and] any parent whose parental rights have not been

²⁰⁸*Id.* at 5.

²⁰⁹*Id.* at 6.

²¹⁰*Id.*

²¹¹*Id.* (citing *Byrd v. Byrd*, 20 Ohio App. 2d 183 (1969), paragraph one of syllabus).

²¹²*Id.* at 6-7.

²¹³*J.F. v. D.B.*, 848 N.E.2d 873, 874 (Ohio Ct. App. 2006).

²¹⁴*Flynn v. Bimber*, 70 Pa. D. & C.4th 261 (C.P. Erie 2005), *vacated sub nom.*, *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006).

²¹⁵*Rice v. Flynn*, 2005-Ohio-4667, ¶ 12.

²¹⁶*Id.* at ¶ 1.

²¹⁷*Id.* at ¶ 27.

previously terminated”²¹⁸ Pennsylvania law also requires such notice “[b]efore a child custody determination is made”²¹⁹

Rice was unquestionably the genetic/biological mother of the triplets.²²⁰ The Ohio Court of Appeals found it to be inconsistent for Erie County, Pennsylvania, Judge Connelly to have declared the surrogacy contract to be void but then not have treated Rice as the biological parent that she was.²²¹ The Ohio court concluded that because the Erie County Court failed to give Rice proper notice and the opportunity to be heard, its decisions regarding Mrs. Bimber’s legal relationship to the triplets and her custodial rights were not entitled to full faith and credit and were not binding on the Ohio courts.²²² Accordingly, the Ohio Court of Appeals remanded these issues to the Summit County, Ohio, Court for determination.²²³

The Ohio Court of Appeals did agree with the Bimbers on one point. The Summit County Court had not considered whether either Flynn or Rice had waived or relinquished their parental rights by their actions or inactions.²²⁴ The Court of Appeals decreed that the Summit County Court must address this issue on remand.²²⁵ While there might arguably have been some basis for this contention with regard to Rice, it is difficult to understand how it could apply to Flynn. Not only had Flynn promptly sued for custody, but Mrs. Bimber had successfully sued him, as the father, for child support.

XI. BREACH OF CONTRACT REDUX, OHIO COURT OF APPEALS (MARCH 2006)

In March 2006, the Ohio Court of Appeals (Ninth Appellate District) issued a second opinion, this one reviewing the Summit County Court’s dismissal of Flynn’s breach of contract action in which he sought to recover the money paid to the Bimbers under the surrogacy agreement, as well as child support he had been ordered to pay.²²⁶ As noted, the Ohio trial court had, like the Erie County, Pennsylvania, Court, declared the surrogacy contract void as against public policy.²²⁷ The Ohio Court of Appeals, finding the surrogacy contract to be valid and enforceable, reversed.²²⁸

²¹⁸28 U.S.C. § 1738A(e) (2000).

²¹⁹23 PA. CONS. STAT. § 5425(a) (2004).

²²⁰*See supra* note 107.

²²¹*Rice*, 2005-Ohio-4667, at ¶ 32.

²²²*Id.*

²²³*Id.* at ¶ 34. The decision also suggests that the Ohio trial court might have concurrent jurisdiction with the Pennsylvania trial court to address custody (parenting) under Ohio’s repealed version of the UCCJA which applied to the case. *Id.* This created the potential for even more inter-state conflicts over the triplets.

²²⁴*Id.* at ¶ 38.

²²⁵*Id.* at ¶ 42.

²²⁶*J.F. v. D.B.*, Summit No. CV 04 02 1218 slip op. at 1-2 (Ohio C.P. Summit May 11, 2005).

²²⁷*See supra* text accompanying notes 205-213.

²²⁸*J.F. v. D.B.*, 848 N.E.2d 873, 874 (Ohio Ct. App. 2006).

The Court of Appeals reasoned that under Ohio law the individuals who provide a child’s genes are the natural parents and “[i]f the genetic providers have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents.”²²⁹ The court found that, “Flynn and Rice were the genetic providers, so Flynn and Rice were the children’s parents under Ohio law.”²³⁰ While this conclusion makes perfect sense as to Flynn, it appears to be completely baseless as to Rice since she had specifically waived her parental rights in Section 3 of the surrogacy agreement which provided:

[Egg Donor] agrees that she shall have no rights, by descent or otherwise, to any eggs, the resulting embryo(s) if any, the fetus(es) if any, and/or the child, if any, as a result of the procedure, and that by signing this document, she is waiving any such rights.²³¹

The Ohio Court of Appeals is rather more persuasive in its reasoning as to the Bimbers. Since they were not the triplets’ parents, they had “no parental rights to contract away.”²³² Even though a Pennsylvania trial court had later given Mrs. Bimber parental rights (in a decision not entitled to full faith and credit), neither of the Bimbers had parental rights at the time they signed the surrogacy agreement.²³³ Thus the agreement did not violate public policy by their waiving of parental rights they simply did not then possess.²³⁴ Since the Bimbers unquestionably had breached the contract by taking the triplets and suing for custody, the appeals court concluded that they were liable for restitution of the monies paid by Flynn under the contract, as well as for his attorney fees.²³⁵

Next the Court of Appeals turned to Flynn’s damages relating to child support.²³⁶ Section 15 of the surrogacy agreement specifically addressed this issue:

In the event custody is awarded to [Mr. and Mrs. Bimber], [Mr. Flynn] shall be indemnified by [Mr. and Mrs. Bimber] for any and all monies he is required to pay for child support, or pregnancy expenses pursuant to court order. [Mr. Flynn] shall be entitled to immediate reimbursement from [Mr. and Mrs. Bimber] for all monies and/or other forms of consideration paid to [the Bimbers] pursuant to this agreement.²³⁷

The Summit County Court had declared this provision void based on settled “Ohio’s public policy prohibiting parents from abrogating their obligations to

²²⁹*Id.* at 879 (citing *Belsito v. Clark*, 644 N.E.2d 760 (Ohio C.P. Summit 1994)).

²³⁰*Id.*

²³¹Contract, *supra* note 32, § 3 (emphasis in original).

²³²*J.F.*, 848 N.E.2d at 879.

²³³*Id.*

²³⁴*Id.*

²³⁵*Id.*

²³⁶*Id.*

²³⁷Contract, *supra* note 32, § 15.

support their children through a private agreement.”²³⁸ Again, the appeals court disagreed. The appeals court found that this provision was not an abrogation of a child support obligation.²³⁹ Rather, it simply meant that “if the Bimbers decide to seek and obtain custody of the child (or children), then they would become the legal parents and no longer merely the surrogate.”²⁴⁰ In that case, “the surrogacy agreement would terminate, and under the agreement Flynn would be treated as merely the sperm donor and not the parent.”²⁴¹ Since a sperm donor is not obligated to pay child support under Ohio law, this indemnification provision does not violate Ohio public policy.²⁴² Accordingly, the Ohio appeals court concluded, “Mr. and Mrs. Bimber are liable to Flynn for all monies that he has been required to pay to them by court order, such as child support”²⁴³

The rationale for this conclusion seems, at best, strained. It is difficult to understand how the appeals court could have equated Flynn with an anonymous sperm donor who does not assert parental rights and becomes a legal stranger to the resulting child or children. Flynn never claimed in any litigation that he was not the father of the triplets nor that he did not want to exercise parental rights. The result of the Bimbers’ breach of contract left Flynn as the triplets’ legal father under all the judicial decisions in both Pennsylvania and Ohio. Similarly, Mr. Bimber never argued to any court that he was the father nor claimed any custodial rights whatsoever. To the extent that the appeals court’s reasoning suggests that Mr. and Mrs. Bimber ever became the joint parents of the triplets upon termination of the surrogacy contract or by order of any court, it is not based in fact.

XII. THE PENNSYLVANIA SUPERIOR COURT SPEAKS (APRIL 2006)

On April 21, 2006, the Superior Court of Pennsylvania (an intermediate court of appeals) rendered its decision on the appeal from Erie County regarding custody of the triplets and termination of the egg donor’s (Rice’s) parental rights.²⁴⁴ Anyone expecting clarification from the court as to the law in Pennsylvania on surrogacy contracts was doomed to be disappointed. The appellate court completely side-stepped the issue.²⁴⁵

First, the Superior Court provided its rendition of the facts of the case in a manner almost completely at odds with the trial court. Whereas Judge Connelly had found that Flynn and Donich could not marry because of Donich’s need to continue receiving survivor’s benefits, the Superior Court found that “the couple has always

²³⁸*J.F.*, 848 N.E.2d at 879-80.

²³⁹*Id.* at 880.

²⁴⁰*Id.*

²⁴¹*Id.* (footnote omitted).

²⁴²*Id.*

²⁴³*Id.* at 881.

²⁴⁴*J.F. v. D.B.*, 897 A.2d 1261, 1281 (Pa. Super. Ct. 2006),.

²⁴⁵*Id.* at 1265.

been willing to give up the pension and marry, if necessary, to obtain custody of the triplets."²⁴⁶

More significantly, while the trial court had painted a picture of Mrs. Bimber stepping in to care for the triplets after Flynn and Donich had failed to carry out natural parental duties and expectations while the triplets were hospitalized as newborns at Hamot, the Superior Court found that it was Mrs. Bimber who had thwarted Flynn and Donich. The court emphasized that Flynn and Donich had attended Mrs. Bimber's pre-natal visits until Mrs. Bimber told them to stop.²⁴⁷ Mrs. Bimber thought that Donich called her too frequently while she was carrying the triplets, and asked her not to call so often.²⁴⁸ When Mrs. Bimber had to go on bed rest, she asked Flynn for additional money (\$1,000 a month for four months), which he paid her although he was not obligated to do so under the surrogacy agreement.²⁴⁹

Although Donich expressed a desire to be present for the triplets' birth, Mrs. Bimber scheduled a caesarian section delivery without informing Flynn or Donich, so that Donich could not be there.²⁵⁰ Mrs. Bimber did call SMI the morning of the C-section, and Flynn and Donich did arrive at Hamot that evening to visit the triplets.²⁵¹ Mrs. Bimber then expressed concern that Flynn and Donich had not subsequently visited the triplets while they were at Hamot,²⁵² but it was Mrs. Bimber's failure to inform Flynn and Donich that she had scheduled the C-section which prevented Donich from making alternate arrangements that week for the care of her own grandchildren.²⁵³ Although Mrs. Bimber expressed to Hamot personnel her concern about the lack of visits by Flynn and Donich,²⁵⁴ no Hamot staff member had expressed such a concern, and later the NICU doctor testified that under the circumstances the lack of visits was "not that unusual."²⁵⁵

Mrs. Bimber told Hamot personnel that Flynn and Donich were "not fit to be parents,"²⁵⁶ but they had actually taken all reasonable steps to get ready to take the triplets home.²⁵⁷ Mrs. Bimber cut off Flynn and Donich's visiting rights at Hamot.²⁵⁸ Flynn and Donich drove from Ohio to Pennsylvania to visit the triplets, only to have Hamot personnel lie to them and tell them that the triplets had already been

²⁴⁶*Id.* at 1265, n.2.

²⁴⁷*Id.* at 1267.

²⁴⁸*Id.*

²⁴⁹*Id.*

²⁵⁰*Id.*

²⁵¹*Id.*

²⁵²*Id.* at 1269.

²⁵³*Id.* at 1268, n.7.

²⁵⁴*Id.* at 1269.

²⁵⁵*Id.* at 1269, n.13.

²⁵⁶*Id.* at 1269.

²⁵⁷*Id.* at 1267.

²⁵⁸*Id.* at 1269.

discharged.²⁵⁹ When Hamot did discharge the triplets to Mrs. Bimber two days later, she did not directly inform Flynn and Donich. Mrs. Bimber did not return their multiple phone calls trying to ascertain the whereabouts of the triplets.²⁶⁰ In short, “the manner in which gestational carrier obtained custody of the children was fraught with impropriety, a fact completely overlooked by the trial court.”²⁶¹ Moreover, the Superior Court characterized the conduct of Hamot personnel as “troubling.”²⁶²

Turning to the legal issues, the Superior Court first addressed whether Mrs. Bimber had standing to assert custody rights as being either *in loco parentis* or the legal mother.²⁶³ The court rejected her claim to standing *in loco parentis* because she took the triplets home in defiance of the father’s wishes.²⁶⁴ The court reiterated the settled rule that “a third party may not intervene and assume *in loco parentis* status where the natural parent opposes such intervention.”²⁶⁵ Here, it was clear that Flynn never agreed to Mrs. Bimber’s taking custody of the triplets,²⁶⁶ and steadfastly fought for them.

In order to have found Mrs. Bimber to be the triplets’ legal mother, the trial court had declared the surrogacy contract void as against public policy.²⁶⁷ Flynn argued, and the Superior Court agreed, that it was error for the trial court to have voided the surrogacy contract, for a number of reasons.²⁶⁸ No party had asked the court to invalidate the contract.²⁶⁹ Some of the parties to the contract, specifically Jennifer Rice and Douglas Bimber, were not parties to the Erie County litigation.²⁷⁰ Also the trial court had acted inconsistently; it had voided the contract but treated Rice as an “anonymous biological donor who had signed her rights away” by that same contract.²⁷¹

However, while rejecting the trial court’s invalidation of the contract, the Superior Court neither validated the contract, nor invalidated it on other grounds.

²⁵⁹*Id.*

²⁶⁰*Id.* at 1269-1270.

²⁶¹*Id.* at 1276. Although the Superior Court expressed its “clear disapproval” of Mrs. Bimber’s actions, the court noted that it was not commenting on her motives. Instead it recognized that “[Mrs. Bimber] may have had the very best intentions when she decided to take the children home. We have no reason to doubt the sincerity of her judgments and beliefs. However, those judgments were simply not hers to make.” *Id.* at 1280, n.26.

²⁶²*Id.* at 1281.

²⁶³*Id.* at 1273.

²⁶⁴*Id.*

²⁶⁵*Id.* at 1274 (citing *B.A. v. E.E.*, 741 A.2d 1227, 1229 (Pa. 1999)).

²⁶⁶*Id.* at 1276.

²⁶⁷*Id.* at 1277.

²⁶⁸*Id.*

²⁶⁹*Id.*

²⁷⁰*Id.* at 1277-78.

²⁷¹*Id.* at 1278.

The court stated: “we decline to comment on the validity of surrogacy contracts, either specifically in this case or generally in this Commonwealth.”²⁷²

The Superior Court reversed the finding that Mrs. Bimber is the triplets’ legal mother, primarily because of the failure to notify Rice, the biological mother. In the absence of notice to Rice, “the [trial] court lacked jurisdiction to rule on the issue of who was the ‘legal mother.’”²⁷³

In a brief footnote, the Superior Court stated that it considered, but rejected, the notion that Mrs. Bimber should be granted standing simply because she carried the triplets to birth.²⁷⁴

Rather than remanding the case to afford Rice notice and the opportunity to be heard, the Superior Court reversed the trial court outright and directed that Flynn be awarded full custody of the triplets.²⁷⁵ Because the Superior Court decided the case solely on the issue of standing, it never addressed whether it was in the triplets’ best interests to be uprooted from their home with the Bimbers and transferred to Flynn’s custody.²⁷⁶ By happenstance, Flynn was exercising partial custody of the triplets on the day the Superior Court handed down its decision, so he simply retained possession of them. He allowed the Bimbers to visit the triplets that weekend, deliver their clothes and effects, and say goodbye.²⁷⁷

The Pennsylvania Supreme Court declined to hear Mrs. Bimber’s appeal,²⁷⁸ rendering the Pennsylvania Superior Court’s decision the final Pennsylvania decision in the custody case.

Given the importance of the issues in the case, not only for all the parties concerned but for the general public and the legislature, it is unfortunate that the Pennsylvania Supreme Court denied review. Nor was there anything inevitable about the Superior Court’s resolution of the case. Some other jurisdictions might well have reached a contrary result. Under the United Kingdom’s Human

²⁷²*Id.* at 1265.

²⁷³*Id.* at 1278 (footnote omitted).

²⁷⁴*Id.* at 1280, n.25. The effect of this decision is similar to that of the California Supreme Court in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993). In that case, Anna Johnson was implanted with a zygote created by the sperm of Mark Calvert and the egg of his wife, Crispina, pursuant to a surrogacy contract under which Johnson was to be paid to carry the child to term and the child was to be turned over to the Calverts to raise “as their child.” *Id.* at 778. Johnson reneged, and litigation ensued over custody and who was the legal mother of the child. *Id.* Genetic tests excluded Johnson as the child’s genetic mother, but she predicated her claim of maternity on the fact that she gave birth to the child. *Id.* The California Supreme Court held that where there are competing claims between a genetic mother and the woman who gave birth, the one “who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.” *Id.* at 782. The court considered, but rejected, the idea that a child could have two legal mothers. *Id.* at 781, n.8.

²⁷⁵*J.F.*, 897 A.2d at 1281.

²⁷⁶*Id.* at 1265.

²⁷⁷Telephone interview with Joseph Martone, Esq., Counsel for the Bimbers, Dec. 13, 2006.

²⁷⁸*J.F. v. D.B.*, 909 A.2d 1290 (Pa. 2006).

Fertilisation and Embryology Act 1990, surrogacy agreements are legally unenforceable, and “[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.”²⁷⁹ The Utah legislature enacted essentially identical statutory provisions, but they were struck down as applied by a federal district court.²⁸⁰

Even if the Pennsylvania Supreme Court had rejected the Utah and UK legislative approaches, Mrs. Bimber might still have prevailed under a “best interests of [the] child” analysis, which at least one scholar has suggested in cases of “disputed maternity.”²⁸¹ California Supreme Court Justice Kennard argued for such an approach in her dissent in the factually similar case of *Johnson v. Calvert*:

Unlike the majority, I do not agree that the determinative consideration should be the intent to have the child that originated with the woman who contributed the ovum. In my view, the woman who provided the fertilized ovum and the woman who gave birth to the child both have substantial claims to legal motherhood. Pregnancy entails a unique commitment, both psychological and emotional, to an unborn child. No less substantial, however, is the contribution of the woman from whose egg the child developed and without whose desire the child would not exist.

For each child, California law accords the legal rights and responsibilities of parenthood to only one “natural mother.” When, as here, the female reproductive role is divided between two women, California law requires courts to make a decision as to which woman is the child’s natural mother, but provides no standards by which to make that decision. The majority’s resort to “intent” to break the “tie” between the genetic and gestational mothers is unsupported by statute, and, in the absence of appropriate protections in the law to guard against abuse of surrogacy arrangements, it is ill-advised. To determine who is the legal mother of a child born of a gestational surrogacy arrangement, I would apply the standard most protective of child welfare—the best interests of the child.²⁸²

²⁷⁹Human Fertilisation and Embryology Act, 1990, c. 37, §§ 36, 27, (Eng.). See also, Margaret Brazier, Susan Golombok & Alastair Campbell, *Surrogacy: Review for the UK Health Ministers of Current Arrangements for Payments and Regulation*, 3 HUM. REPROD. UPDATE 623 (1997).

²⁸⁰J.R. v. Utah, 261 F. Supp. 2d 1268, 1293 (D. Utah 2003) (concluding that the statute’s presumption that a surrogate mother is the legal mother of the child violates couple’s fundamental rights to bear and raise children).

²⁸¹Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 130 (2000).

²⁸²851 P.2d 776, 788-89 (Cal. 1993)(Kennard, J., dissenting).

This approach has been adopted by the Michigan legislature, which has not only outlawed surrogacy for compensation,²⁸³ but has also provided that the “best interests of the child” be the dispositive consideration in custody disputes concerning children born of surrogacy:

If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child.²⁸⁴

The main advantage to the Pennsylvania Supreme Court’s denial of review was that it did make certain the triplets’ placement with Flynn, providing them with some stability at last.

XIII. LOOSE ENDS AND LOSERS

While the custody battle over the Erie “surrogate triplets” has ended and the triplets now reside in Ohio with Flynn and Donich (to the extent that Flynn and Donich actually live together), related litigation continues in three jurisdictions at this writing. In May 2005, Flynn and Donich sued Steven Litz and Surrogate Mothers, Inc. (SMI) in Indiana for negligence and breach of contract arising from Litz’s work in drafting and execution of the surrogacy contract.²⁸⁵ In December 2007, by a 4-3 vote, the Supreme Court of Ohio upheld the decision of the Ohio Court of Appeals that the surrogacy contract was valid and enforceable.²⁸⁶ However, the majority also concluded that it was improper for the Court of Appeals to have assessed monetary damages for breach of contract (return of monies paid under the contract, return of court-ordered child support, and attorney fees), and remanded the case to the Ohio trial court to determine damages.²⁸⁷ In November 2006, Flynn and Donich sued the Hamot Medical Center for wrongfully discharging the triplets to Mrs. Bimber and related actions.²⁸⁸ Flynn and Donich alleged that they had spent more than \$200,000 in legal fees to secure custody of the triplets. Additionally, Flynn brought an action in Erie County, Pennsylvania, in May 2006, against Ms. Bimber to recoup the \$43,000 in child support he was ordered to pay her while the

²⁸³MICH. COMP. LAWS § 722.859 (2002). *Cf. Doe v. Attorney General*, 487 N.W.2d 484 (Mich. Ct. App. 1992).

²⁸⁴MICH. COMP. LAWS § 722.861 (2002).

²⁸⁵Complaint at 3,5, *Flynn v. Litz*, No. 55D01-0504-CT-0211 (Ind. Super. Ct. Apr. 25, 2005).

²⁸⁶*J.F. v. D.B.*, Slip Opinion No. 2007-Ohio-6750, pp. 3-4.

²⁸⁷*Id.* at 4.

²⁸⁸Complaint at 5-6, *Flynn v. Hamot Med. Ctr.*, Civ. Div. No. 14676-06 (Pa. Ct. Com. Pl. filed Nov. 13, 2006). At this writing, the pleadings are closed in this case, and there has been no discovery as of yet. Telephone Conversation with Neal Devlin, Esq., Co-Counsel with Francis Klemensik, Esq., Knox Law Firm, Erie, Pa, for Hamot Medical Center (Aug. 13, 2007).

triplets were in her care.²⁸⁹ Judge Kelly issued a decision in March 2007 denying relief on the basis that the support order was valid until it was vacated by the Superior Court in April 2006 and that a father has a duty to support his children.²⁹⁰ In January 2008, the Pennsylvania Superior Court affirmed that decision, finding that Flynn had an absolute duty to support his children and his court-ordered support payments did not unjustly enrich Ms. Bimber.²⁹¹ Since the Ohio Supreme Court had ruled a few weeks earlier that the Bimbers are potentially liable to Flynn to repay the court-ordered support (as well as other damages), this creates a potential constitutional battle over which state's ruling on child support is entitled to full faith and credit.

Other than perhaps some of the lawyers involved, it is difficult to find any winners in this saga. James Flynn and Eileen Donich did obtain the triplets, but at great effort and expense, and after not being able to raise them for the first two-and-a-half years of their lives. As of now, Flynn has a claim against the Bimbers in Ohio for a substantial amount of money, but even if the Ohio courts finally impose judgment in a definite amount, it is difficult to believe that the Bimbers will ever be able to pay back the contract money, child support and attorneys fees. The Bimbers have lost the three children they raised for some two-and-a-half years, with no right to ever see them again and the very real possibility of a large monetary judgment against them which it appears they cannot possibly pay. The Bimbers' three other children have lost the triplets that they had come to know as their brothers. Jennifer Rice, who believed that she was "donating" her eggs (undoubtedly for compensation)²⁹² as part of a private surrogacy agreement, found herself dragged into very public, multi-state litigation, in which at times she was induced to assert parental rights which it is abundantly clear she had no real interest in exercising. Steven Litz, SMI, and Hamot Medical Center face years of litigation, loss of reputation and potential money judgments.

Last, and most important, are the triplets themselves. For two-and-a-half years, they were locked in a tug of war between parent figures who could not even agree on their names. Now, at age four, they are in the custody of a man and a woman in their sixties, who may or may not live together, and may or may not be married.²⁹³ The triplets have no contact with the family that reared them for the first two-and-a-half years of their lives.²⁹⁴

²⁸⁹Flynn v. Bimber, Docket No. NS 200601089 (Pa. Ct. Com. Pl. March 2007).

²⁹⁰*Id.*

²⁹¹J.F. v. D.B., 2008 PA Super. 2.

²⁹²See Stack, *supra* note 23.

²⁹³Throughout this litigation, Flynn and Donich have never been described by any court as being married, and, as noted, their willingness or financial ability to marry was the subject of some dispute. However, in the caption of their November 2006 lawsuit against Hamot Medical Center, they are listed as "James O. Flynn and Eileen Donich, his wife, Plaintiffs." Flynn v. Hamot, Civ. Div. No. 14676-06. Of course, it is possible that they got married sometime between the last evidentiary hearing and November 6, 2006, when Flynn verified the Complaint.

²⁹⁴Email from Joseph P. Martone, Esq., counsel for the Bimbers (Feb. 10, 2008) (on file with author).

XIV. A LEGISLATIVE SOLUTION?

No matter what one’s opinion of the triplets’ ultimate placement with the biological father, the Erie “surrogate triplets” case can only be viewed as a tragedy and a failure of the legal system.

Throughout the litigation, judges in both Pennsylvania and Ohio have decried the void in legislation addressing the contentious issues surrounding surrogacy. Perhaps the most articulate comment on the case was made by President Judge Slaby of the Ohio Court of Appeals, concurring in that court’s judgment. Judge Slaby wrote:

The majority points out that there are only a few states that have even begun to address the issue of determining who the parents of a surrogate child may be. Even the few states that have begun to address the issues involved have approached the issues from four different directions. Unless the state legislators begin to address the multiple issues involved, it will be the children that will be caught in a continual tug of war between the egg donor or donors, the sperm donor or donors, the surrogate parent or parents, and those that simply want to adopt a child from what they perceive as the ideal parents.²⁹⁵

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has attempted to fill this void, with, at best, limited success. In 1988, NCCUSL proposed the Uniform Status of Children of Assisted Conception Act (USCACA), but because of disagreement among the Commissioners, that act offered two alternatives: to either allow but regulate or prohibit surrogacy agreements. Only two states enacted the USCACA and they took opposite positions; Virginia chose to regulate such agreements, and North Dakota opted to declare them invalid.²⁹⁶

After the USCACA failed to gain support in the vast majority of state legislatures, NCCUSL withdrew that act and tried again in 2000 with a complete revision of the Uniform Parentage Act (UPA).²⁹⁷ Article 8 of the UPA (2000), which has since been revised in 2002, attempts to clarify legal parenting of a child born as the result of a “gestational agreement.”²⁹⁸ Article 8 recognizes that conception through surrogacy is here to stay so, unlike the USCACA, it does not give states the option of outlawing surrogacy outright. Of course, any state remains free not to enact the UPA (2000), to enact it without Article 8, or to enact it with a modified version of Article 8.²⁹⁹

Article 8 contains a critical provision which, had it been enacted and utilized in the triplets case, would have avoided the tragic (and expensive) litigation concerning the Erie triplets. It provides that, “[a] gestational agreement is enforceable only if

²⁹⁵J.F. v. D.B., 848 N.E.2d 873, 881 (Ohio Ct. App. 2006)(Slaby, J., concurring).

²⁹⁶See UNIF. PARENTAGE ACT, art. 8, introductory cmt. (2000) (amended 2002), *available at* <http://www.law.upenn.edu/bll/ulc/upa/final2002.htm>.

²⁹⁷*Id.*

²⁹⁸*Id.*

²⁹⁹*Id.* Article 8 is a “bracketed [a]rticle.” *Id.* The Act provides that “[b]rackets in the statutory text are inserted to warn legislative draftsmen in the several states that the suggested language is likely to be subject to local variation.” UNIF. PARENTAGE ACT, art. I.

validated” by a court prior to conception.³⁰⁰ The court must find, *inter alia*, that: a proper home study of the intended parents has been made and that the intended parents are suitable; “all parties have voluntarily entered into the agreement and understand its terms; . . . adequate provision has been made for all reasonable health-care expense[s] associated with the gestational agreement until the birth of the child; . . . and . . . the consideration, if any, paid to the prospective gestational mother is reasonable.”³⁰¹ Then, upon the birth of a child within 300 days of assisted reproduction, the intended parents are to file a notice with the court which validated the agreement, and the court “shall” issue an order: “[(1)] confirming that the intended parents are the parents of the child; [(2)] if necessary, ordering that the child be surrendered to the intended parents; and [(3)] directing [the appropriate state agency] to issue a birth certificate naming the intended parents as the parents of the child.”³⁰²

Article 8 contains two other highly relevant, and useful, provisions. It provides that “[a] gestational agreement, whether in a record or not, that is not judicially validated” is unenforceable.³⁰³ This would effectively require all parties to obtain judicial validation prior to conception. There is an escape clause, however. Prior to conception (but not thereafter), “the prospective gestational mother, her husband [if any], or either of the intended parents may terminate the gestational agreement by giving written notice” to all other parties.³⁰⁴ Additionally, the court may terminate the agreement upon good cause shown.³⁰⁵

Article 8 has an additional provision designed to encourage contracting intended parents to seek pre-conception judicial approval of gestational agreements. In the absence of such approval, “[i]ndividuals who are parties to a nonvalidated gestational agreement as intended parents may be held liable for [the] support of the resulting child, even if the agreement is otherwise unenforceable.”³⁰⁶

While reasonable minds could certainly differ as to the wisdom of the legislative scheme proposed in Article 8 of the UPA (2000),³⁰⁷ or as to some of its details, surely it would be a vast improvement over the current situation in which most state legislatures have failed to address surrogacy through statutes and those that have done so have failed to act in a uniform manner. As the Erie triplets case amply demonstrates, the state courts in more than one state might well be required to adjudicate issues arising from the same agreement.

³⁰⁰UNIF. PARENTAGE ACT, §§ 801(c), 803(a).

³⁰¹*Id.* art. 803(b).

³⁰²*Id.* art. 807(a).

³⁰³*Id.* art. 809(a).

³⁰⁴*Id.* art. 806(a).

³⁰⁵*Id.* art. 806(b).

³⁰⁶*Id.* art. 809(c).

³⁰⁷The American Bar Association has adopted the Proposed Model Act Governing Assisted Reproduction (2006), Article 6 of which contains provisions paralleling Article 8 of the UPA (2000). See ABA Family Law Newsletter, <http://www.abanet.org/family/newsletters/2008/february.html>. The Proposed Model Act Governing Assisted Reproduction is available at <http://www.abanet.org/family/committees/artmodelact.pdf>.

Unfortunately, most state legislatures continue to avoid the troubling issues raised by surrogacy. The UPA (2000) was approved by NCCUSL in mid-2000. As of this writing, it has only been enacted in seven states,³⁰⁸ and five of those states did not include Article 8 in their version of the Act.³⁰⁹ Only Texas and Utah have adopted the UPA (2000) with Article 8, and both of them modified some of the language in it.³¹⁰ Even more discouraging, the UPA (2000) was only introduced in two state legislatures (Alabama and Nevada) in 2007, neither of which enacted it; and so far in 2008, it is being introduced only in Alabama and New Mexico.³¹¹ Thus, despite the continued occurrence of well-publicized battles over children conceived through surrogacy, there is simply a lack of momentum among state legislatures to address this subject in a uniform manner and save other children, and other parties to surrogacy, from heartache and uncertainty.

³⁰⁸Uniform Law Commissioners, Uniform Parentage Act Fact Sheet, http://www.nccusl.org/Update/uniformact_fact_sheets/uniformacts-fs-upa.asp (last visited Feb. 12, 2008).

³⁰⁹Delaware (13 DEL. CODE ANN. tit. 13, §§ 8-101 to -904 (2007)); North Dakota (N. D. CENT. CODE §§ 14-20-01 to -66 (2007)); Oklahoma (OKLA. STAT. tit. 10, §§ 7700-101 to -902 (2007)); Washington (WASH. REV. CODE ANN. § 26.26.010-.913 (2007)); and Wyoming (WYO. STAT. ANN. §14-2-401 to -907 (2007)).

³¹⁰Texas (TEX. FAM. CODE ANN. §§160.751-.763 (Vernon 2001)); Utah (UTAH CODE ANN. §§ 78-45g-801 to -809 (2005)).

³¹¹*See supra* note 308.